UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Public Service Company of New Mexico Docket No. EL05-151-000

v.

Southwestern Public Service Company

ORDER ON COMPLAINT ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES AND REFUND EFFECTIVE DATE

(Issued November 14, 2005)

1. In this order, the Commission sets for hearing and settlement judge procedures a complaint filed by Public Service Company of New Mexico (PNM) against Southwestern Public Service Company (Southwestern). The complaint involves: (1) the cost-based rate for Interruptible Power Service to PNM under an Interconnection Agreement with Southwestern; (2) Southwestern's fuel cost adjustment clause charges to PNM from January 2001 through December 31, 2004 for Interruptible Power Service under the Interconnection Agreement; and (3) Southwestern's fuel cost adjustment clause charges to PNM, from January 1, 2001 through the present, under two firm power sales agreements entered into under Southwestern's market-based sales tariff.

I. Background

2. PNM is an investor-owned utility engaged in the generation, transmission, distribution, and sale and trading of electricity within New Mexico. Southwestern is an investor-owned utility with service territories in eastern New Mexico, the Panhandle of Texas, and small portions of Kansas and Oklahoma. PNM is a customer of Southwestern.

3. PNM and Southwestern are parties to an interconnection agreement dated November 23, 1982 (Interconnection Agreement).[1] Under Service Schedule C – Interruptible Power Service, Southwestern sells power to PNM on a partially interruptible basis at cost-based rates. In addition, these rates include charges under Southwestern's fuel cost adjustment clause. Southwestern also bills PNM for fuel cost adjustment clause charges under two firm power sales contracts entered into under Southwestern's market-based sales tariff.[2]

II. PNM's Complaint

4. On September 15, 2005, PNM filed a complaint with the Commission under section 206 of the Federal Power Act (FPA)[3] and Rule 206 of the Commission's Rules of Practice and Procedure[4] alleging that Southwestern's cost-based rate under Service Schedule C[5] is excessive, unjust and unreasonable and is unduly discriminatory and/or preferential. PNM asserts that Southwestern's rates under Service Schedule C are above costs and above or nearly equal to rates to customers purchasing firm service at cost-based rates. It says that interruptible service should be at substantially lower rates than firm service. PNM requests that the Commission establish a hearing and investigation to determine the just and reasonable level of this rate and that the Commission establish a refund effective date of September 15, 2005.

5. In addition, PNM asserts that Southwestern's historical billings to PNM under its fuel cost adjustment clause have violated the provisions of the fuel cost adjustment clause and the Commission's regulations governing fuel cost and purchased power cost adjustment mechanisms and, therefore, have been in violation of the filed rate. PNM requests that the Commission establish an investigation of Southwestern's fuel cost

[1] We note that this is not a generator Interconnection Agreement.

[2] These agreements were entered into under a Master Power Purchase and Sale Agreement dated August 2, 1999 between PNM and Southwestern which, in turn, was entered into pursuant to Southwestern's market-based sales tariff.

[3] 16 U.S.C. § 824e (2004).

[4] 18 C.F.R. § 385.206 (2005).

[5] According to PNM, the service is partially interruptible: Section 2 of Service Schedule C provides that curtailment by Southwestern "will not exceed five percent (5%) of the total energy that Southwestern would otherwise have offered to PNM in that month."

adjustment clause under the Interconnection Agreement for the period from January 1, 2001 through December 31, 2004.[6] PNM claims that Southwestern's misapplication of its fuel cost adjustment clause charges for this time period has resulted in overcharges of approximately $29 million to PNM.

6. Likewise, PNM asserts that Southwestern's ongoing fuel cost adjustment clause billings to PNM under the firm power sales agreements are inconsistent with the applicable fuel cost adjustment clause provisions of the agreements and the Commission's regulations governing fuel cost and purchased power costs.[7] PNM requests that the Commission establish an investigation of Southwestern's fuel cost adjustment clause under the firm sales agreements from January 1, 2001 through the present and on an ongoing basis during the period of this proceeding, with refunds to be ordered consistent with the results of the investigation.

7. In support of its arguments, PNM's complaint included testimony and exhibits: (1) recommending a lower demand charge rate for the interruptible service based upon an analysis of Southwestern's cost of service using data from Southwestern's 2004 Form 1; and (2) asserting that Southwestern has misapplied the fuel cost adjustment clause by including all energy-related purchased power costs, regardless of whether such costs are permissible under the filed rate, the applicable contractual formulas under the firm sales agreements, or the Commission's regulations. PNM states that its assertions are based on an analysis of data provided by Southwestern concerning its historical fuel cost adjustment clause billings.

8. PNM states that the bundled demand charge for the interruptible service it receives is $5.85/kW-month. Based on PNM's analysis of Southwestern's cost of service, PNM claims that the bundled rate for Interruptible Power Service to PNM should be $3.36/kW-month, incorporating a transmission component of $1.42/kW-month and a production-related demand charge of $1.94/kW-month. In its analysis, PNM distinguishes between

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[6] Issues concerning the fuel cost adjustment clause as it applies to Service Schedule C beginning January 1, 2005 are being addressed in Docket No. ER05-168-000. *See Southwestern Public Service Company, et al.*, 109 FERC ¶ 61,373 at P 13 (2004).

[7] PNM states that because the rates for service under these agreements are negotiated rates that are not subject to changes by application of either party, Southwestern's filing of changes to its fuel cost adjustment clause in Docket No. ER05-168-000 does not affect the rates charged to PNM under these agreements, and the pre-January 1, 2005 fuel cost adjustment clause remains in effect.

sales to cost-of-service customers [8] and market-based customers.[9] It allocates production-related costs to cost-of-service customers, while revenues from sales to market-based customers are credited against the production costs. According to PNM, revenues should be treated as a credit because Southwestern has an obligation to prudently operate its rate base assets to minimize costs and risks taken by customers in long-term contracts at market-based rates.

9. In comparison to Southwestern's $5.85/kW-month demand charge for interruptible service, PNM states that Southwestern sells full and partial requirements service, which is firm and not interruptible, at cost-based unbundled production demand charge rates of $3.88/kW-month for full requirements service and $4.45/kW-month for partial requirements service, plus transmission charges for each service. PNM asserts that this means that Southwestern's interruptible rates to PNM, when compared to rates applicable to its firm full and partial requirements service, are above costs, and that interruptible service should be at a substantially lower rate than firm service.

10. In addition, PNM asserts that with regard to the fuel cost adjustment clause, Southwestern has included the costs of wholesale marketing sales in the system average fuel costs flowed through its fuel cost adjustment clause. Instead of using power from rate base power plants to decrease costs to buyers subject to cost-of-service rate arrangements, Southwestern has used these assets to increase cost-of-service rates and shareholder profits by imposing a portion of the incremental fuel costs of off-system sales on cost-of-service customers.

11. PNM requests privileged treatment for one firm sales contract between Southwestern and PNM. PNM states that under Order No. 2001,[10] Southwestern was not required to file this contract with the Commission. It states that the contract contains competitively sensitive commercial information regarding the transaction between PNM and Southwestern, disclosure of which could harm the parties' commercial interests.

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[8] These customers purchase power under contracts subject to rates based upon Southwestern's cost of service.

[9] These customers purchase power at negotiated rates under Southwestern's market-based rate authority.

[10] Revised Public Utility Filing Requirements, Order No. 2001, FERC Stats. and Regs., Regulations Preambles, ¶ 31,127 (2002).

III. Notice of Filing and Responsive Pleadings

12. Notice of PNM's complaint was published in the *Federal Register*, 70 Fed. Reg. 56,673 (2005), with answers, interventions, or comments due on or before October 17, 2005. Timely motions to intervene were filed by Cap Rock Energy Corporation (Cap Rock); Golden Spread Electric Cooperative, Inc. (Golden Spread); Farmers' Electric Cooperative, Inc., *et al*.; and Occidental Permian Ltd. and Occidental Power Marketing, L.P. (Occidental). Southwestern opposes Occidental's motion to intervene, arguing that Occidental does not have an interest in the proceeding. Southwestern filed an answer to PNM's complaint. PNM filed a response to Southwestern's answer.

13. Cap Rock contends that the allegations made by PNM are similar to allegations at issue in Docket No. EL05-19-000, *et al*.[11] While Cap Rock believes it would otherwise make sense to consolidate PNM's complaint with that proceeding, Cap Rock acknowledges the impracticality of consolidation, given the advanced stage of that proceeding. Nonetheless, Cap Rock requests that the Commission allow the parties and the presiding judge in Docket No. EL05-19-000, *et al.* an opportunity to consider whether PNM's complaint should be consolidated with those dockets.

IV. Southwestern's Answer

14. Southwestern argues that the complaint should be rejected because PNM's claims are legally and factually unsupported. Southwestern argues that it is not appropriate to compare the rates for customers purchasing power at cost-of-service rates with the rates for customers paying market-based rates. It states that all wholesale firm capacity customers are treated on a consistent and comparable basis in setting rates. In addition, Southwestern argues that PNM has not provided sufficient support for a bundled rate of $3.36/kW-month and has not demonstrated that its rates to PNM under Service Schedule C are unjust or unreasonable, or unduly discriminatory or preferential.

15. Regarding the fuel cost adjustment clause, Southwestern argues that it is inappropriate to attribute incremental cost to a firm capacity sale that is backed by all of Southwestern's power supply resources while PNM pays for non-firm energy on the basis

[11] *Southwestern Public Service Company, et al.*, 109 FERC ¶ 61,373 (2004).

of average fuel costs. Rather, Southwestern contends that incremental fuel cost should be assigned to PNM's interruptible energy purchases, not selected firm system capacity sales.[12]

16. Southwestern states that consolidation of this complaint with the proceedings in Docket Nos. EL05-19-000, *et al.* is not appropriate because those proceedings have been under way for nearly a year, the parties have conducted extensive discovery in both the settlement and litigation phases of the case, and several rounds of testimony have been filed. Southwestern notes that the hearing is schedule to begin in December 2005.

17. Southwestern supports PNM's request for privileged treatment of the firm sales contract between PNM and Southwestern.

18. Southwestern also argues that if the complaint is not denied, then at least the request to establish a refund effective date of September 15, 2005 should be denied because PNM's attempts to resolve its differences with Southwestern have not been extensive.

19. Finally, Southwestern states that it intends to file in the near future a new section 205 rate case that will include revised rates for non-firm interruptible service to PNM under Service Schedule C. Southwestern states that once it is filed, that proceeding will be the proper place to address interruptible base rates charged to PNM.

V. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding. The Commission is also granting Occidential's opposed motion to intervene because Occidental has demonstrated a sufficient interest in the outcome of this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.213(a)(2) (2005), prohibits an answer to an answer, unless otherwise ordered by the decisional authority. We are not persuaded to accept PNM's answer to Southwestern's answer and will, therefore, reject it.

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[12] Southwestern states that if it is ultimately required to assign incremental fuel costs to certain firm capacity sales and not others, then PNM should be required to pay incremental fuel costs for both its non-firm interruptible energy purchases and for each of its two market-based firm system capacity purchases.

21. The Commission denies Cap Rock's request that we provide the parties and the presiding judge in the Docket No. EL05-19-000, *et al.* proceeding an opportunity to consider whether PNM's complaint should be consolidated with that proceeding. That proceeding is far advanced and consolidation would delay it.

22. The Commission is granting the parties' request for privileged treatment of the contract between PNM and Southwestern, consistent with the presiding judge's ruling in Docket Nos. EL05-19-000, *et al.*[13]

B. Analysis

23. We find that the matters raised by PNM in its complaint present issues of material fact that cannot be resolved based on the record before us. Based on a review of the parties' pleadings, our analysis indicates that the rates at issue may be unjust and unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will set the complaint for investigation and establish a trial-type evidentiary hearing to address these issues under section 206 of the FPA.[14]

24. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle the dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed under Rule 603 of the Commission's Rules of Practice and Procedure.[15] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.[16] The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief

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[13] *See Golden Spread Electric Cooperative, Inc., et al.*, Order Granting Late Intervention, Rescinding Prior Order, and Directing Continued Protected Status of Certain Documents at P 15 (issued July 29, 2005 in Docket Nos. EL05-168-002, *et al.*).

[14] 16 U.S.C. § 824e (2004).

[15] 18 C.F.R. § 385.603 (2005).

[16] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

25. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b), as amended by section 1285 of the Energy Policy Act of 2005, requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,[17] we will set the refund effective date at the earliest date possible, *i.e.*, the date of the filing of the complaint, which is September 15, 2005.[18]

26. Section 206(b) of the FPA also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Although we do not have the benefit of the presiding judge's decision, based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures or, if the case were to go to hearing immediately, by August 14, 2006. We thus estimate that if the case were to go to hearing immediately we would be able to issue our decision within approximately 4 months of the filing of briefs on exceptions and briefs on opposing exceptions, or by February 15, 2007.

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[17] *See, e.g., Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

[18] While section 206 of the FPA requires the Commission to specify a refund effective date, the Commission has long recognized that costs recovered through automatic adjustment clauses, such as the FCAC at issue here, may be examined even prior to the refund effective date. *E.g., UtiliCorp United, Inc. v. City of Harrisonville, Missouri*, 95 FERC ¶ 61,054, at p. 61,130 & n. 17, *order on reh'g*, 95 FERC ¶ 61,392 (2001); *Boylston Municipal Light Department, et al. v. Vermont Yankee Nuclear Power Corp.*, 92 FERC ¶ 61,185 at p. 61,640 & n. 10 (2000); *Boston Edison Company*, Opinion No. 376, 61 FERC ¶ 61,026 at p. 61,145 & n. 103 (1992); *Montaup Electric Power Compan*y, 55 FERC ¶ 61,174 at p. 61,561 & n. 5 (1991).

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held concerning: (1) Southwestern's cost-based rates and fuel cost adjustment clause charges under the Interconnection Agreement from January 1, 2001 through December 31, 2004, and (2) certain fuel cost adjustment clause charges under the two market-based firm sales agreements from January 1, 2001 through the present. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(C) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(E) The refund effective date established pursuant to section 206(b) of the Federal Power Act, as amended by section 1285 of the Energy Policy Act, is September 15, 2005.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.